90-153

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BILL ARMONTROUT, Warden, Missouri State Penitentiary,
Petitioner,

vs.

EDWARD PARTON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

WILLIAM L. WEBSTER
Attorney General

STEPHEN D. HAWKE
Counsel of Record
Assistant Attorney General

Post Office Box 899
Jefferson City, Missouri 65102
(314) 751-3321

Attorneys for Petitioner

St. Louis Law Printing Co., Inc., 13307 Manchester Road 63131 314-231-4477

QUESTION PRESENTED

WHETHER THE *EX POST FACTO* CLAUSE OF THE UNITED STATES CONSTITUTION PROHIBITS RETROACTIVE APPLICATION OF A PAROLE-ELIGIBILITY REGULATION WHERE (1) IT WAS PROMULGATED BY THE EXECUTIVE BRANCH, (2) IT WAS PROMULGATED PURSUANT TO AUTHORITY DELEGATED BY THE LEGISLATURE LONG BEFORE THE DATE OF RESPONDENT'S RAPE, AND (3) IT WAS NOT INTENDED AS PUNISHMENT.

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BILL ARMONTROUT, Warden, Missouri State Penitentiary,
Petitioner,

vs.

EDWARD PARTON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit affirming the judgment granting the petition for writ of habeas corpus is reported at 893 F.2d 1214 (8th Cir. 1990) (A-2). The Order of the United States District Court for the Eastern District of Missouri granting the petition for a writ of habeas corpus is not reported, but is included in the Appendix (A-5 — A-7). The Report and Recommendation of the United States Magistrate is also unreported, but is included in the Appendix (A-8 — A-17).

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit issued its Opinion of February 12, 1990 (A-2). Petitioner's timely petition for rehearing and rehearing *en banc* was denied on May 16, 1990 (A-1). Pursuant to 28 U.S.C. § 2201(c) and Supreme Court Rule 20, the present petition for a writ of certiorari was required to be filed within ninety days of the denial of rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Article I, §10, clause 1, of the United States Constitution provides:

> No state shall enter into any treaty, alliance or confederation; grant letters of marque and reprisal; coin money, emit bills of credit; make anything but gold and silver coin a tender in payment of debt; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

2. Section 589.040, RSMo 1986, provides:

> 1. The director of the department of corrections and human resources shall develop a program of treatment, education and rehabilitation for all prisoners who are serving sentences for sexual assault offenses. When developing such programs, the ultimate goal shall be the prevention of future sexual assaults by the participants in such programs, and the director shall utilize those concepts, services, programs, projects, facilities and other resources designed to achieve this goal.
>
> 2. All persons imprisoned by the department of corrections and human resources for sexual assault offenses shall

be required to participate in the programs developed pursuant to subsection 1 of this section.

3. Section 217.690.1, RSMo 1986, provides:

When in its opinion there is reasonable probability that an inmate of a state correctional institution can be released without detriment to the community or to himself, the board may in its discretion release or parole such person except as otherwise prohibited by law. All paroles shall issue upon order of the board, duly adopted.

4. Section 217.690.4, RSMo 1986, provides:

The board shall adopt rules not inconsistent with law, in accordance with section 217.040, with respect to the eligibility of inmates for parole, the conduct of parole hearings or conditions to be imposed upon parolees. Whenever an order for parole is issued it shall recite the conditions thereof.

5. Section 549.261.4, RSMo 1978, provides:

The board may adopt such other rules not inconsistent with law as it may deem proper or necessary, with respect to the eligibility of prisoners for parole, the conduct of parole hearings or conditions to be imposed upon parolees. Whenever an order for parole is issued, it shall recite the conditions thereof.

6. 14 C.S.R. 80-2.010(4)(D) provides:

All inmates imprisoned for sexual assault offenses shall participate in and complete the prescribed treatment program developed by the Department of Corrections and Human Resources prior to being eligible for parole (section 589.040, RSMo (1986)).

STATEMENT OF THE CASE

Respondent was charged as a habitual offender and convicted of the July 25, 1970 statutory rape of then six-year-old Karen. *State v. Parton,* 487 S.W.2d 523, 524 (Mo. 1972). After respondent committed rape, fellatio and sodomy upon the body of the victim, he was arrested, tried and sentenced to fifty years' imprisonment with the Missouri Department of Correction. *Id.* at 524-25. In addition to his direct appeal, *id.,* respondent has engaged in two state post-conviction litigations pursuant to Missouri Supreme Court Rule 27.26 (repealed January 1, 1988). *See, Parton v. State,* 545 S.W.2d 338 (Mo.App., St.L.D. 1976); *Parton v. State,* 571 S.W.2d 806 (Mo.App., St.L.D. 1978). Parton has also engaged in a previous habeas corpus litigation pursuant to 28 U.S.C. §2254. *See, Parton v. Wyrick,* 614 F.2d 154 (8th Cir.), *cert. denied,* 449 U.S. 847 (1980).

Respondent then filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2241 on September 5, 1985, in the United States District Court for the Eastern District of Missouri. Following pleadings, briefs and an evidentiary hearing, United States Magistrate Carol Jackson issued a Report and Recommendation that three grounds be denied with prejudice and two counts be dismissed without prejudice for failure to exhaust state remedies (A-23). Petitioner objected to the Magistrate's Report and waived the exhaustion defense. On November 23, 1987, District Judge Stephen L. Limbaugh adopted the Magistrate's Report and Recommendation (A-22). Respondent filed a notice of appeal to the United States Court of Appeals for the Eighth Circuit. On April 27, 1988, the Court of Appeals remanded the cause to the District Court for a determination of the merits of the remaining grounds in the petition (A-18).

On October 18, 1988, Magistrate Jackson recommended that a conditional writ of habeas corpus issue (A-8). The writ was to become absolute if the Missouri Board of Probaton and Parole

declined to provide respondent a hearing on the cancellation of his January 11, 1985 presumptive parole release date (A-16 — A-17). The Magistrate further ordered that the writ be conditioned upon the Board's refraining from enforcing the MOSOP[1] completion requirement (A-17). After timely objection by petitioner, District Judge Limbaugh adopted the Magistrate's Report and Recommendation on November 23, 1988, and December 9, 1988 (A-6 — A-7). After judgment was entered on January 27, 1989 (A-5), petitioner filed a timely notice of appeal to the United States Court of Appeals for the Eighth Circuit. Respondent filed a timely notice of cross-appeal. On February 12, 1990, the United States Court of Appeals for the Eighth Circuit issued its opinion affirming the judgment of the District Court (A-2). Petitioner filed a timely petition for rehearing or rehearing *en banc*. On May 16, 1990, the Court of Appeals denied the petition for rehearing. The petition for rehearing *en banc* was also denied; however, Circuit Judges Fagg, Bowman and Beam voted to grant the petition for rehearing *en banc* (A-1). This petition for a writ of certiorari ensues.

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[1] MOSOP is the acronym for the Missouri Sexual Offender Program. *See*, §589.040, RSMo 1986.

ARGUMENT

The Ex Post Facto Clause of the United States Constitution does not prohibit retroactive application of a parole-eligibility regulation where (1) it was promulgated by the Executive Branch, (2) it was promulgated pursuant to authority delegated by the Legislature long before the date of respondent's rape, and (3) it was not intended as punishment.

The United States Court of Appeals for the Eighth Circuit determined that the Missouri Board of Probation and Parole's May 1, 1984 extension of respondent's presumptive parole date (A-38 — A-39) and the November 7, 1984 cancellation of respondent's presumptive parole date (A-40 — A-41) were unlawful because they violated the *Ex Post Facto* Clause of Article I, Section 10 of the United States Constitution. In particular, the Court of Appeals found that the Missouri Board of Probation and Parole's application of a MOSOP-completion parole-eligibility requirement was unlawful (A-3 — A-4). Since the Court of Appeals' analysis is improper under the *Ex Post Facto* Clause—at least as interpreted by this Court—petitioner believes this Court's discretionary review of the Court of Appeals' judgment is warranted.

This Court should issue a writ of certiorari in this case due to the important question of federal law involving the construction of the *Ex Post Facto* Clause—in particular, whether a modification in a parole-eligibility requirement can be applied retroactively. Supreme Court Rule 17.1(a), (c). This is an issue where the Court has provided dicta, *Warden v. Marrero,* 417 U.S. 653, 663, 94 S.Ct. 2532, 2538, 41 L.Ed.2d 383 (1974) (dicta); however, there has been no express holding that parole-eligibility requirements, when applied retroactively, violate the *Ex Post Facto* Clause. This is an important issue that requires this Court's guidance and discretionary review under Supreme Court Rule 17.1(a), (c).

Additionally, the Court of Appeals and the Missouri Supreme Court have come to opposite conclusions concerning whether the MOSOP-completion parole-eligibility requirement can be applied retroactively. *Compare Parton v. Armontrout,* 893 F.2d 1214 (8th Cir. 1990), *with State ex rel. Danny Baylis Huston v. James Purkett,* No. 72739 (Mo. banc June 19, 1990). Given the divergent views of the Court of Appeals and the Missouri Supreme Court, the Court should grant discretionary review to resolve the conflict between the federal court and state court. Supreme Court Rule 17.1(a)

In Missouri, the grant of parole is discretionary with the Missouri Board of Probation and Parole. Section 217.690, RSMo 1986. That discretion, however, is curbed by minimal eligibility requirements that should be met before the Board can exercise its discretion to grant or deny parole. These eligibility requirements are either created by the Missouri Legislature, *see, e.g.,* §589.040.1, RSMo 1986 (MOSOP-participation eligibility requirement), or by regulation, *see, e.g.,* 14 C.S.R. 80-2.010(4)(D) (MOSOP-completion parole-eligibility requirement). The organic statute that conveys to the Board the power to create such regulations is located at 217.690.4, RSMo 1986. Its predecessor was essentially the same. It had been in existence since at least 1957. *See,* §549.261.4, RSMo 1978.

With this background of Missouri state law in mind, it is necessary to discuss briefly this Court's view of *ex post facto* law. That view was recently summarized by this Court in *Collins v. Youngblood,* 58 U.S.L.W. 4855 (U.S. June 21, 1990). In *Collins,* the Court adopted the framers' intent of the *Ex Post Facto* Clause as the meaning of the *Ex Post Facto* Clause. This Court summarized:

> Justice Chase's now familiar opinion in *Calder* [*v. Bull,* 3 Dall. 386, 390 (1798) (opinion of Chase, J.)] expounded those legislative acts which in his view implicate the core concern of the *Ex Post Facto* Clauses:

> 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime,* or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment,* and inflicts a *greater punishment,* than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence* and receives less, or different, testimony, than the law required at the time of the commission of the offense, *in order to convict the offender.*

Collins v. Youngblood, 58 U.S.L.W. at 4856 (emphasis in original). Respondent only contended that the parole-eligibility requirement changed the punishment he received and made it greater. Petitioner submits, however, that respondent failed to show a retroactive legislative act that changed the punishment he received for statutory rape. Respondent failed to show a violation of the *Ex Post Facto* Clause within the meaning of *Calder* and *Collins.*

No "legislative acts" are implicated by Missouri's MOSOP-completion parole-eligibility requirement. Section 589.040.2, RSMo 1986, creates only a MOSOP-participation requirement. In other words, the statute requires the prisoner to participate in MOSOP before he is eligible for parole. The Magistrate (A-15, A-17), the District Court (A-7), and the Court of Appeals (A-4) found the MOSOP-participation requirement lawful.

The MOSOP-completion requirement, the requirement the Court of Appeals found violative of the *Ex Post Facto* Clause, is found in the regulations promulgated by the Missouri Executive Branch—the Missouri Board of Probation and Parole. 14 C.S.R. 80-2.010(4)(D). Nothing in §589.040, RSMo 1986, or in any other legislation directs the Missouri Board of Probation and Parole to promulgate a MOSOP-completion regulation. The Missouri Board does have general power to promulgate parole-

eligibility regulations that are not inconsistent with the law. Section 217.690.4, RSMo 1986. The Board has had this power since at least 1957. Section 549.261.4, RSMo 1978. Neither the Court of Appeals nor the District Court identifies a legislative act which is being applied retroactively to the respondent.

The MOSOP-completion requirement was defended upon this basis before the Missouri Supreme Court in *State ex rel. Danny Baylis Huston v. Jimmy Jones,* No. 72739 (Mo. banc, June 19, 1990). The Missouri Supreme Court's denial of relief demonstrates a split of authority concerning the lawfulness of the MOSOP-completion requirement. The Legislature conveyed authority to the Missouri Board of Probation and Parole to create such an eligibility requirement as early as 1957. Respondent is unable to demonstrate retroactive application of legislative acts to him. Respondent fails to demonstrate an *Ex Post Facto* Clause violation. *See, United States ex rel. Chaka v. Lane,* 685 F.Supp. 1069, 1072-1073 (N.D.Ill. 1988) (finding *ex post facto* claim meritless where parole board always had discretion to require *en banc* parole hearings); *Heirens v. Mizell,* 729 F.2d 449, 463 (7th Cir. 1984) (lawful to codify previous parole considerations).

In dicta, this Court has indicated that a retroactive application of a parole-eligibility requirement would violate the *Ex Post Facto* Clause. *Warden v. Marrero,* 417 U.S. at 668, 94 S.Ct. at 2638. Generally, the federal courts of appeals have followed this dicta. *See, Fender v. Thompson,* 883 F.2d 303, 305-306 (4th Cir. 1989), *citing, Schwartz v. Muncy,* 834 F.2d 396, 398 n. 8 (4th Cir. 1987); *Burnside v. White,* 760 F.2d 217, 220 (8th Cir. 1985), *cert. denied,* 474 U.S. 1022 (1985); *Lerner v. Gill,* 751 F.2d 450, 454 (1st Cir. 1985); *Beebe v. Phelps,* 650 F.2d 774, 777 (5th Cir. Unit A 1981); *Rodriguez v. United States Parole Commission,* 594 F.2d 170, 176 (7th Cir. 1979). Significantly, however, in the *Warden* case, Justice Blackmun was joined by Justice Douglas and Justice Marshall in dissent. Those Justices thought that parole eligibility was not a penalty

within the meaning of the "general savings" clause. 1 U.S.C. §109. The Missouri Supreme Court agrees with those Justices' treatment of parole eligibility as a matter of Missouri state law. In Missouri, parole is not punishment.

> Under Missouri law the granting of a conditional order, such as parole, is not part of the trial[;] nor is it in any way incident to it. *State ex rel. Browning v. Kelly,* 309 Mo. 465, 274 S.W. 731 (Mo. banc 1925); *State v. Merk,* 281 S.W.2d 607 (Mo.App. 1955). The sentence[,] which consists of confinement for a period of time or a fine[,] constitutes the penalty. *McCulley v. State,* 486 S.W.2d 419 (Mo.App. 1972).

Gallup v. State of Missouri Department of Corrections and Human Resources, 733 S.W.2d 435, 436 (Mo. banc 1987). Accordingly, in *Gallup,* the repeal of an extended parole term for drug offenders was not saved by Missouri's "general savings" clause. *See, id., construing,* §1.160, RSMo 1986. Since parole is not punishment, but rather a method by which the Department of Corrections enforces custody, the *Ex Post Facto* Clause is not implicated by a change in parole-eligibility requirements.

In Missouri, a judgment commits a defendant to the custody of the Missouri Department of Corrections for a term of years. The Department of Corrections has complete discretion to transfer inmates within and among facilities, §217.350, RSMo 1986, including the discretion to allow a defendant to serve his sentence on parole. Section 217.690, RSMo 1986. This Court recently agreed to review prison regulations concerning eligibility for solitary confinement as violating the *Ex Post Facto* Clause. *Rust v. Gunter,* 110 S.Ct. 1522 (1990); *Rust v. Gunter,* 58 U.S.L.W. 3636 (U.S.) (case summary). In *Rust,* the Court will be called upon to determine whether a retroactive change in regulations concerning the location of custody, *i.e.,* solitary confinement vis-a-vis general population, constitutes "greater punishment" for the defendant's crime. *Collins v.*

Youngblood, 58 U.S.L.W. at 4856, *citing, Calder v. Bull,* 3 Dall. 386, 390 (1799). The present case is the same. The Court would be called upon to decide whether a change in regulation concerning the location of custody, *i.e.*, general population vis-a-vis parole, can be applied retroactively. The present case would be a good case for the Court to consider in tandem with *Rust v. Gunter. See generally, Russell v. Eaves,* 722 F.Supp. 558, 560 (E.D.Mo. 1989) (finding MOSOP-completion requirement constitutional since the requirement does not increase the defendant's sentence).[2]

Given the divergent opinions between the Missouri Supreme Court and the United States Court of Appeals for the Eighth Circuit, this Court should grant a writ of certiorari in order to resolve those divergent views. Likewise, given the significance of this question to every state with parole-eligibility requirements, the question presented is a significant question of federal law that deserves this Court's review.

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[2] It is unclear whether the Court of Appeals affirmed the district court's finding that the Missouri Board of Probation and Parole's application of § 217.690, RSMo 1986, instead of § 549.261, RSMo 1978 violated the *Ex Post Facto* Clause (A-4 n.3, A-12). A hearing by the Parole Board before cancellation of the presumptive parole date is a procedural right that can be modified or eliminated by the Legislature without violation of the *Ex Post Facto* Clause. *See Collins v. Youngblood,* 58 U.S.L.W. at 4856, 4859. Since the lower courts did not have the benefit of *Collins,* remand of the cause on this issue would be proper.

CONCLUSION

Petitioner respectfully requests that the petition for writ of certiorari be granted and that the judgment of the United States Court of Appeals for the Eighth Circuit be reversed.

Respectfully submitted,

WILLIAM L. WEBSTER
Attorney General

STEPHEN D. HAWKE
Assistant Attorney General
Counsel of Record

Post Office Box 899
Jefferson City, Missouri 65102
(314) 751-3321

Attorneys for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-1306/1355EM

Edward Parton,
Appellee/Cross-Appellant,

vs.

Bill Armontrout,
Appellant/Cross-Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

Judges Fagg, Bowman and Beam would have granted the petition.

May 16, 1990

Order entered at the direction of the Court

/s/ Robert D. St. Vrain

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-1306

Edward Parton,
Appellee,

v.

Bill Armontrout,
Appellant.

No. 89-1355

Edward Parton,
Appellant,

v.

Bill Armontrout,
Appellee.

Appeals from the United States District Court
for the Eastern District of Missouri.
[PUBLISHED]

Submitted: January 18, 1990

Filed: February 12, 1990

Before LAY, Chief Judge, FLOYD R. GIBSON, Senior Circuit Judge, and JOHN R. GIBSON, Circuit Judge.

PER CURIAM.

The petitioner, Edward Parton, is currently incarcerated and serving a fifty-year sentence following a conviction for statutory rape. That conviction was affirmed in *State v. Parton,* 487 S.W.2d 523 (Mo. 1972). A subsequent collateral attack on that conviction was denied. *See Parton v. State,* 545 S.W.2d 338 (Mo. Ct. App. 1976). On November 7, 1984, the Missouri Board of Probation and Parole (MBPP) cancelled Parton's presumptive release date, which had been set for January 11, 1985. The cancellation was based on Parton's failure to complete Phase II of the Missouri Sexual Offender Program, Mo.Rev.Stat. § 589.040 (MOSOP), which became a requirement for parole for all sex offenders in 1980.

On September 23, 1985, Parton filed this habeas corpus petition challenging the MBPP's actions. The district court,[1] adopted the recommendations of the magistrate[2] and conditionally issued a writ of habeas corpus. The writ was to become final if the respondent failed to provide the petitioner with a hearing regarding the cancellation of his release date. The writ was also conditional on the respondent not requiring the petitioner to complete the MOSOP. The magistrate had found ap-

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[1] The Honorable Stephen L. Limbaugh, United States District Court Judge for the Eastern District of Missouri.

[2] The Honorable Carol E. Jackson, United States Magistrate for the Eastern District of Missouri.

plication of the current Missouri parole statute to Parton[3] and requiring Parton to complete the MOSOP before he could be eligible for parole, to violate the *Ex Post Facto* clause of the United States Constitution.

Both parties have appealed. The respondent argues that the magistrate erred in concluding that application of the current Missouri parole statute and the completion requirement of the MOSOP statute to the petitioner violates the *Ex Post Facto* clause. In his cross-appeal, Parton argues that the magistrate erred in conditioning the writ of habeas on the respondent providing him with a hearing. He argues a hearing would provide no useful purpose at this point and that he should be released immediately.

After careful review of the briefs and record, we find that the factual findings of the district court are not clearly erroneous and that no error of law appears. Both appeals are denied and the judgment of the district court and recommendation of the magistrate is affirmed. *See* 8th Cir. R. 14.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

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[3] The magistrate found that the applicable parole statute was Mo.Rev.Stat. § 549.261 (repealed 1982), which made parole mandatory once the Board of Probation and Parole (Board) determined the statutory and regulatory guidelines were met, thus giving rise to a protected liberty interest. *See Williams v. Missouri Bd. of Probation & Parole,* 661 F.2d 697, 699 (8th Cir. 1981), *cert. denied,* 455 U.S. 993 (1982). The current parole statute, section 217.690, does not create any such protected liberty interest in parole, as parole is left entirely up to the discretion of the Board even where the prisoner has fulfilled all statutory and regulatory requirements. *See Gale v. Moore,* 763 F.2d 341, 343 (8th Cir. 1985) (per curiam). Thus, if section 549.261 is applicable, cancellation of Parton's presumptive release date without a hearing is impermissible.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 85-2111C(5)

Edward Parton,
Petitioner,

vs.

Bill Armontrout,
Respondent.

JUDGMENT

In accordance with the Court's Orders filed on November 23, 1988, and December 9, 1988,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that petitioner's petition for a writ of habeas corpus be conditionally granted.

Dated this 27th day of January, 1989.

/s/ Eyvon Mendenhall
Clerk of Court

By: (illegible)
Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 85-2111 C (5)

Edward Parton,
Petitioner,

vs.

Bill Armontrout,
Respondent.

ORDER

On November 23, 1988 this Court entered an order approving the report and recommendation of United States Magistrate Carol E. Jackson dated October 18, 1988. In the report and recommendation the Magistrate recommended that a writ of habeas corpus be conditionally issued to become final if the State of Missouri fails to provide petitioner[,] within a reasonable period of time an opportunity to be heard on the extension and/or cancellation of his presumptive release date. For the purpose of clarification, this order should be entered.

IT IS THEREFORE ORDERED that a writ of habeas corpus is issued except that the writ can be set aside on request if, within a period of sixty (60) days, the State of Missouri provides petitioner an opportunity to be heard on the extension and/or cancellation of his presumptive release date.

Dated this 9th day of December, 1988.

/s/ Stephen L. Limbaugh
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 85-2111 C (5)

Edward Parton,
Plaintiff,

vs.

Bill Armontrout,
Defendant.

ORDER

IT IS HEREBY ORDERED that Magistrate Jackson's Report and Recommendation is **SUSTAINED, ADOPTED** and **INCORPORATED** herein.

Dated this 23rd day of November, 1988.

/s/ Stephen L. Limbaugh
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 85-2111-C (5)

Edward Parton,
Plaintiff,

v.

Bill Armontrout,
Defendant.

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

Before the Court is the petition of Edward Parton for a writ of habeas corpus pursuant to 28 U.S.C. §2254. This matter was referred to the undersigned United States Magistrate for a report and recommended disposition pursuant to 28 U.S.C. §636(b) as to grounds 4 and 5 of Parton's petition.[1]

In 1971, a jury in the Circuit Court of the City of St. Louis, Missouri convicted the petitioner of statutory rape for which he

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[1] This matter was previously before the Court upon all claims asserted in Parton's petition. The undersigned, after a hearing, recommended that a writ of habeas corpus as to grounds 1 through 3 inclusive, be denied. It was further recommended that the petition be dismissed without prejudice as to grounds 4 and 5 for failure to exhaust state remedies. (*See* Report and Recommendation of October 14, 1987). Thereafter, respondent expressly waived the exhaustion requirement as to grounds 4 and 5 (*See* Respondent's Objections to Report of Magistrate). The district court adopted the Report and Recommendation on November 23, 1987. Petitioner appealed and the Eighth Circuit remanded the case for a determination as to the merits of grounds 4 and 5. [*See Edward Parton v. Bill Armontrout*, No. 88-1144 (8th Cir., April 27, 1988].

was sentenced to fifty years' imprisonment. The conviction and sentence were affirmed on direct appeal. *State of Missouri v. Parton,* 487 S.W.2d 523 (Mo. 1972). Post-conviction relief as well as applications for writs of *error coram nobis* were denied. *Parton v. State of Missouri,* 545 S.W.2d 338 (Mo.App. 1976).

In his fourth ground for federal habeas relief petitioner asserts that he was transferred from the Missouri Eastern Correctional Center (MECC) to his current place of confinement, the Missouri State Penitentiary (MSP), in retaliation for filing a lawsuit against certain prison officials. As his fifth ground, the petitioner claims that the application of the Missouri parole statute, Mo.Rev.Stat. §217.690 (Supp. 1984), in determining his eligibility for release and imposition of the requirement that he complete the Missouri Sexual Offenders Program (MOSOP) as a condition of his parole release violate the *Ex Post Facto Clause* of the United States Constitution, Art. I, §10, cl. 1.

Retaliatory Transfer Claim (Ground 4)

At the hearing, petitioner testified that he was assaulted by several inmates in January 1984 while incarcerated at MECC.[2] As a result of medical treatment and placement in detention, petitioner was unable to continue his participation in Phase II of the MOSOP program. In March 1984, Parton filed a civil rights action in this Court pursuant to 42 U.S.C. §1983 against the Superintendent of MECC and several correctional officers alleging, *inter alia,* that the defendants failed to protect him from attack by other inmates. *See, Parton v. Frey, et al.,* No. 84-875-C (2). In an amended complaint filed on December 3, 1986, the petitioner alleges that he was transferred in retaliation for filing suit against the defendants.

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[2] The undersigned's report and recommendation of October 14, 1987 summarizes the evidence adduced at the hearing as well as the documentary evidence before the Court. That summary is incorporated herein by reference. Only that evidence which directly relates to grounds 4 and 5 of the petition will be reiterated here.

In April 1984, petitioner was dismissed from Phase II of MOSOP because he had missed a number of sessions, but on April 23, 1984 he was placed in a new Phase II group. On May 7, 1984, Parton received a conduct violation for being one and one-half hours late in attending a "team" meeting. (Petitioner's Exh. 1). He testified that he had gone to the prison's mail room on that date and had sent a message to his MOSOP instructor that he would be late to class. However, before Parton arrived at his MOSOP class he was called to an interview concerning the conduct violation. As a result, Parton arrived sixteen minutes late to the MOSOP session and on May 9, he was dismissed from Phase II because his tardiness was deemed inexcusable.

On June 1, 1984 Parton was transferred from MECC to MSP. He testified that he was told that his transfer was for security reasons related to the assault which had occurred in January 1984, but the inmates who assaulted him at MECC have [sic] also been transferred to MSP. Parton further testified that prior to being transferred from MECC, the MOSOP instructor stated he would not be able to re-enroll in the program for one year and that she believed that he considered his lawsuit to be more important than the program. He testified that several other MECC officials had commented about his lawsuit just prior to the transfer. Before the hearing in this case, petitioner had applied for writs of *habeas corpus ad testificandum* to secure the attendance and testimony of four other inmates. His applications were denied by the Court. (*See,* Memorandum and Order dated May 21, 1987). At the hearing Parton made an offer of proof that his proposed witnesses would have testified that they had been transferred from one institution to another in retaliation for filing lawsuits against prison officials.

There is no MOSOP program available to Parton at MSP and, therefore, he cannot complete Phase II at that facility. Marie Clark, Director of the MOSOP program at MECC, testified that she has the authority to have Parton transferred to a facility that offers the program. She further testified that she

would be willing to arrange such a transfer to enable Parton to complete Phase II. Notwithstanding this offer, Parton testified that he would not re-enroll in MOSOP under any circumstances because he considers the program to be demeaning and racially biased.

Generally, the mere fact of transfer to another correctional institution is not sufficient to entitle a prisoner to federal habeas relief as such a claim does not challenge the fact or duration of custody. 28 U.S.C. §2254(a). In this instance, however, petitioner is claiming in part that transfer to MSP denied him an opportunity to participate in the MOSOP program. Because completion of the MOSOP program is a precondition to parole, the petitioner's transfer to an institution that does not offer the program affects the duration of his confinement and, as such, the transfer may constitute a basis for federal habeas corpus relief. *See, Stinson v. Nelson,* 525 F.2d 728 (9th Cir. 1975) (where federal prisoner challenges transfer to state prison, allegations do not arise to constitutional level in absence of allegation that transfer was punitive in nature or that it affected good time credits where the only official suggestion of reason for transfer was to permit federal and state sentences to be served concurrently). However, the petitioner still bears the burden of establishing the facts entitling him to habeas relief. *Powell v. Wyrick,* 744 F.2d 632 (8th Cir. 1984), *cert. denied,* 469 U.S. 1223 (1985) (habeas petitioner has burden of proving the allegations of his petition); *Hill v. Linahan,* 697 F.2d 1023 (11th Cir. 1983) (burden of proof in habeas proceeding always on the petitioner).

Whether the petitioner was transferred to MSP in retaliation for filing a lawsuit is an issue involved in his pending §1983 action. Consequently, the undersigned is reluctant to make any determination on the merits of that issue in the instant habeas proceeding. However, regardless of the legitimacy *vel non* of the transfer, it is evident that the action taken by the prison officials does not affect the fact or duration of petitioner's con-

finement. Here, the respondent has offered to place the petitioner in Phase II of MOSOP at a facility where the program is offered. The petitioner, however, is adamant in his refusal to re-enroll in the program. Thus, it is the petitioner's refusal, not his transfer to MSP, that constitutes an impediment to his completion of MOSOP and consequent eligibility for release on parole. Accordingly, the petitioner should be denied relief on ground four of his petition.

Ex Post Facto Claim (Ground 5)

Petitioner also claims that application of the current Missouri parole statute, Mo.Rev.Stat. §217.690 (1982), constitutes a violation of the *Ex Post Facto Clause* of the United States Constitution, Art. I §10 cl. 1. Petitioner argues that he is entitled to parole consideration under Mo.Rev.Stat. §549.261 (repealed 1982), the parole statute in effect at the time of the commission of the crime. Petitioner asserts that under the repealed statute he acquired a liberty interest in parole release by reason of the establishment of presumptive release dates by the Board of Probation and Parole ("Board") and that he could not be deprived of this interest without due process of law. Petitioner contends that he is entitled to federal habeas relief because he was denied a hearing by the Board when his presumptive release date was extended from August 23, 1984 to January 11, 1985 and thereafter when the January 11, 1985 presumptive release date was cancelled. (Petitioner's Exh. 2, 3).

Any statute which makes more burdensome punishment for a crime after its commission is prohibited as an *ex post facto* law. *Dobbert v. Florida,* 432 U.S. 282, *reh'g denied,* 434 U.S. 882 (1977). An *ex post facto* law is one which imposes what can fairly be designated punishment for past acts. *Jensen v. Schweiker,* 709 F.2d 1227 (8th Cir. 1983). In order for a statute to be *ex post facto*, it must be retrospective and it must disadvantage the offender affected by it. *Weaver v. Graham,* 450 U.S. 24 (1981); *Maggard v. Wyrick,* 800 F.2d 195 (8th Cir.

1986), *cert. denied,* 479 U.S. 106 (1987). A retrospective law may be constitutionally applied to the petitioner if it is not to his detriment. *Weaver v. Graham,* 450 U.S. at 33.

Under §549.261 a prisoner can obtain a liberty interest in parole release that is protected by due process. *Williams v. Missouri Board of Probation & Parole,* 661 F.2d 697 (8th Cir. 1981), *cert. denied,* 455 U.S. 993 (1982). The revised parole statute, §217.690, does not, however, create a protected liberty interest in parole. *See, Gale v. Moore,* 763 F.2d 341, 343 (8th Cir. 1985) (*per curiam*); *Green v. Black,* 755 F.2d 687, 688 (8th Cir. 1985). Section 217.690 has been held to be retrospective in that it may alter the consequences attached to a crime for which a prisoner has already been sentenced. *Burnside v. White,* 760 F.2d 217 (8th Cir.), *cert. denied,* 474 U.S. 1022 (1985).

Thus, the issue to be confronted is whether the application of §217.690 rather than §549.261 operates to petitioner's disadvantage. This inquiry focuses on the challenged provision and not any special circumstances which mitigate its effect upon a particular individual. *Weaver v. Graham,* 450 U.S. 24, 33 (1981). The undersigned concludes that application of §217.690 did operate to petitioner's disadvantage.

In November 1983, petitioner was denied immediate release because the Board believed that "release at this time would depreciate the seriousness of the offense committed." (Petitioner's Exh. 1). However, the Board scheduled him for release on August 23, 1984. Actual release, however, was dependent upon "continued record of good conduct and an acceptable release plan." (Petitioner's Exh. 1). It is clear that the Board's decision not to release petitioner in November 1983 because release would depreciate the seriousness of the crime is a permissible reason to decline parole release under either §217.690 or §549.261. *Burnside v. White,* 760 F.2d at 221-222 (reason to decline parole release of prisoner because such release would depreciate seriousness of offense was permissible under both

§549.261 and §217.690. Under §549.261 once the Board determined that statutory and regulatory guidelines had been met, release was mandatory and this gave rise to a protected entitlement. *Williams v. Missouri Board of Probation and Parole*, 661 F.2d at 699. Under §217.690, the Board may exercise its discretion to deny release despite a prisoner's fulfillment of the statutory and regulatory requirements.

In the instant case, the Board evidently determined that by August 23, 1984 petitioner could be released without detriment to himself or to the community. Nothing in the Board's notification or in the repealed parole statute or regulations reserves to the Board the right to redetermine whether the petitioner's release in August 1984 could be affected without detriment to himself or society. In fact, the notification and the regulations only provide that the petitioner's actual release was to be conditioned upon continued good conduct and an acceptable release plan (Petitioner's Exh. 1; 14 C.S.R. 80-2.010(5)). Thus, under §549.261, if petitioner met these additional requirements[3] he was to be released on August 23, 1984 and he could not be deprived of this entitlement without due process. *See, Williams, supra*. Under §217.690, however, the Board was not required to release the petitioner even if he met all statutory and other requirements by August 23, 1984. Thus, the petitioner was disadvantaged by the Board's application of §217.690 to him rather than §549.261. Under §549.261 petitioner was entitled to a hearing before his presumptive release date could be extended or cancelled because the release date, once established, created in petitioner a justifiable expectation of release.

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[3] Consideration of whether petitioner met these additional requirements for release in August 1984 and January 1985 is not germane to the Court's consideration inasmuch as under *Graham* the focus is upon the challenged provisions and not special circumstances which may mitigate its impact on petitioner.

Petitioner also asserts that application of Mo.Rev.Stat. §589.040 and pertinent regulations requiring participation in MOSOP as a condition of release constitutes an *ex post facto* violation. The MOSOP statute and regulations promulgated thereunder contain two separate requirements: participation in the MOSOP program and completion of the program prior to being released on parole. The requirement of participation in MOSOP does not constitute an *ex post facto* law. *Ex post facto* legislation relates to increased or more burdensome *punishment* for the commission of a crime. *Jensen v. Schweiker*, 709 F.2d 1227 (8th Cir. 1983) (*ex post facto* law is imposition of what can be fairly designated as punishment for past acts). The MOSOP program is not designed to punish but to rehabilitate, treat and educate those convicted of sexual offenses. *See*, Mo.Rev.Stat. §589.040.1. Further, the requirement of participation in a rehabilitative treatment program is not a detriment to those convicted of a sexual offense.

The requirement of completion of the MOSOP program prior to release can, however, serve to extend the period of a prisoner's incarceration.[4] The completion requirement is one determinant of the length of sentence a sexual offender will serve. Those who fail to complete or refuse to complete the program will serve a longer sentence or their full sentence. Thus, the completion requirement is retrospective. *See, Weaver v. Graham*, 450 U.S. 24 (1981) (change in law regarding good time credits is retrospective in that good time credits are one determinant of the petitioner's prison term and a change in the credits can alter petitioner's effective sentence.).

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[4] Mo.Rev.Stat. §589.040.2 only requires *participation* in the MOSOP program. Although the requirement of completion is mandated by regulations promulgated by the Missouri Department of Corrections, 14 C.S.R. 80.2010(4)(D), such may nevertheless constitute *ex post facto* legislation. *See, Rodriquez v. U.S. Parole Commission*, 594 F.2d 170 (7th Cir. 1979) (where Congress delegated to agency authority to make rule, resulting rule is an extension of Congressional statute for *ex post facto* purposes).

However, to constitute an *ex post facto* violation, the completion requirement must be detrimental. This inquiry examines only the challenged provisions and not any special circumstance which may mitigate its effect on a particular individual. *Id.* at 33. Upon analysis of the challenged statute, the undersigned finds that the completion requirement is detrimental. The requirement effectively prevents a prisoner from gaining release despite the length of time served and the conduct exhibited during imprisonment, the ordinary components for early release. The testimony presented at the evidentiary hearing revealed that the Parole Board establishes the presumptive release date without input from the MOSOP director. As a result, a presumptive release date can be fixed at a time before completion of the MOSOP program is even possible. Assuming all other conditions of release are fulfilled, an inmate could conceivably be released sooner but for imposition of the MOSOP completion requirement. Thus, it is clear that circumstances justifying early release prior to promulgation of the completion requirement would no longer justify early release after promulgation of the completion requirement. Hence, application of the MOSOP completion requirement to petitioner "constricts" [petitioner's] opportunity to earn early release, and thereby makes more onerous the punishment for crimes committed before its enactment." *Id.* at 35-36.

RECOMMENDATION

The constitutional violation found in this case does not mandate the immediate release of petitioner. Rather, the state should first be given the opportunity to correct any constitutional violation. *Hilton v. Braunskill,* ____ U.S. ____, 107 S.Ct. 2113 (1987). In the instant case, the appropriate remedy at this point is to direct the state to reconsider the petitioner's presumptive release by applying the parole statute and regulations in effect when the crime occurred. *Weaver v. Graham,* 450 U.S. 24, 36 n.22 (1981). Thus, it is recommended that a writ of habeas corpus be conditionally issued to become final if the

State of Missouri fails to provide petitioner, within a reasonable period of time, an opportunity to be heard on the extension and/or cancellation of his presumptive release date. It is further recommended that the State of Missouri be ordered to refrain from enforcing the requirement of *completion* of MOSOP in the determination of the petitioner's early release.

/s/ CAROL E. JACKSON
UNITED STATES MAGISTRATE

Dated this 18th day of October, 1988.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-1144

Edward Parton,
Appellant,

v.

Bill Armontrout,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri

ORDER

(Filed: April 27, 1988)

The district court has entered an order denying the petition of Edward Parton for a writ of habeas corpus brought under 28 U.S.C. § 2255 as to grounds 1, 2, and 3. The district court dismissed the claims asserted in grounds 4 and 5 without prejudice. A report had been presented to the district court by Magistrate Jackson recommending denial of the writ on grounds 1, 2 and 3, but concluding that Parton had not exhausted state remedies with respect to grounds 4 and 5. The state filed objections to this report and expressly waived the statutory exhaustion requirements with respect to grounds 4 and 5, stating that these grounds should be returned to the magistrate for determination on the merits.

We conclude that the appeal will proceed more orderly if grounds 4 and 5 are determined by the district court and, accordingly, we remand to the district court for determination of the claims asserted in grounds 4 and 5, leaving to the district court the question as to whether it should first obtain the report from the magistrate with respect to the merits of these grounds.

A true copy.

Attest: /s/ Robert St. Vrain
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX H

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
Office of the Clerk
1114 Market Street
St. Louis, Missouri 63101

RE: 85-2111C(5), PARTON VS. ARMONTROUT

David L. Coffman
611 Olive
St. Louis, Missouri 63101

Michael Whitworth
Asst. Atty. General
Mo. Attorney General
P.O. Box 899
Jefferson City, MO 65102

Stephen D. Hawke
Asst. Atty. General
P.O. Box 899
Jefferson City, Missouri 65102

____xxxxx____ Enclosed is copy of an ORDER entered this date by the Honorable Stephen N. Limbaugh in the above-styled cause.

_____ Enclosed is copy of an ORDER AND MEMORANDUM entered this date by the Honorable Stephen N. Limbaugh in the above-styled cause.

_____ Enclosed is copy of an MEMORANDUM AND ORDER entered this date by the Honorable Stephen N. Limbaugh in the above-styled cause.

Sincerly,

EYVON MENDENHALL, CLERK

/s/ L. Miller
Deputy Clerk

Enclosure(s)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 85-2111 (C) (5)

Edward Parton,
Petitioner,

vs.

William Armontrout,
Respondent.

ORDER

(Filed: November 23, 1987)

IT IS HEREBY ORDERED that the review and recommendation of United States Magistrate Carol E. Jackson is ACCEPTED.

IT IS FURTHER ORDERED that the petition of Edward Parton for a writ of habeas corpus under 28 U.S.C. § 2254 be DENIED as to grounds 1, 2 and 3 asserted therein.

IT IS FINALLY ORDERED that the claims asserted by the petitioner in grounds 4 and 5 be DISMISSED without prejudice.

Dated this 23rd day of November, 1987

/s/ Stephen N. Limbaugh
United States District Judge

APPENDIX I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 85-2111 C (5)

Edward Parton,
Petitioner,

v.

William M. Armontrout,
Respondent.

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

(Filed: October 14, 1987)

This matter is before the Court upon the petition of Edward Parton for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This cause was referred to the undersigned United States Magistrate pursuant to 28 U.S.C. § 636(b) and a hearing was held on May 26, 1987. The petitioner was present at the hearing with court-appointed counsel.

Background

In 1971, a jury in the Circuit Court of the City of St. Louis, Missouri, convicted the petitioner of statutory rape for which he was sentenced to fifty years imprisonment. The conviction and sentence were affirmed on direct appeal. *State of Missouri v. Parton,* 487 S.W. 2d 523 (Mo. 1972). Petitioner then filed a motion to vacate the judgment and sentence under Missouri Supreme Court Rule 27.26. After this motion was overruled, the petitioner filed two applications for writs of *error coram nobis*, both of which were dismissed. On appeal from the denial of his Rule 27.26 motion and the petitions for writs of *error coram nobis*, all three judgments were affirmed. *Parton v. State of*

Missouri, 545 S.W. 2d 338 (Mo. App. at 1976). The petitioner then filed a petition under 28 U.S.C. § 2254 for a writ of habeas corpus in this Court. The petition was dismissed and the dismissal was affirmed on appeal. *Parton v. Wyrick,* 614 F.2d 154 (8th Cir. 1980). The issues presented in the instant § 2254 petition were not raised in the foregoing proceedings.

The petitioner filed the instant habeas corpus petition on September 23, 1985. He asserts as grounds for relief: (1) that he was denied due process when the Missouri Board of Probation and Parole extended and ultimately cancelled his presumptive release date without notice, hearing or valid reasons and in retaliation for a lawsuit he filed against prison officials; (2) that he was denied due procss in that the presumptive release date was cancelled because the petitioner failed to complete the Missouri Sexual Offenders Program (MOSOP), even though completion of the program was not a condition imposed at the time the presumptive release date was originally granted; and (3) that he was denied due process because the institution where the petitioner is confined does not have a sex offenders program and, therefore, the petitioner cannot satisfy the condition for release on parole. In subsequent pleadings filed with the Court and at the hearing, the petitioner asserted the following additional grounds for federal habeas relief: (4) that he was transferred from the Missouri Eastern Correctional Center (MECC) to his current place of confinement, the Missouri State Penitentiary, in retaliation for filing a lawsuit against certain prison officials, and (5) that the application of the current Missouri parole statute, Mo.Rev.Stat. § 217.690 (Supp. 1984), in determining the petitioner's eligibility for release and the imposition of the requirement that he complete MOSOP as a condition of his parole release both violate the *Ex Post Facto* Clause of the United States Constitution (U.S. Const. Art. I, §10, cl.1).

In January and June, 1985, Parton filed petitions for a writ of habeas corpus in the Circuit Court of Cole County and the Missouri Court of Appeals, respectively, based on the same claims

asserted in grounds 1, 2, and 3 of the instant § 2254 petition. Both petitions were summarily denied by the state courts. A review of the record before this Court reveals that the constitutional claims asserted in grounds 4 and 5 (retaliatory transfer and *ex post facto* application of MOSOP and § 217.690) have not been presented to the Missouri courts for their consideration.

Evidence Presented at the Hearing

While the petitioner was an inmate at the Missouri State Penitentiary, he received a notice from the Board of Probation and Parole dated November 4, 1983 advising that he had been scheduled for release from confinement by parole on August 23, 1984. (Petitioner's Exh. 2). The notice stated that the release decision was "above guideline" and that Parton's "[a]ctual release depends upon continued record of good conduct and an acceptable release plan." The notice further provided:

> The reasons for the action taken are: Because of the offense behavior demonstrated in the commission of the offense for which you are serving time in that excessive force was involved in the commission of a statutory rape of a six year old child; the Board believes that release at this time would depreciate the seriousness of the offense committed.
>
> From a study of your arrest and conviction record it is evident that you have established a history of prior criminal involvement; therefore, the Board believes that there does not appear to be a reasonable probability at this time that you would live and remain at liberty without violating the law. Therefore, the Board in its discretion has determined to go above the guidelines and schedule you for release on parole on 8-23-84.

In December 1983, Parton was transferred to MECC where he enrolled in Phase I of MOSOP.

MOSOP is a statutorily-created program of "treatment, education and rehabilitation for all prisoners who are serving sentences for sexual assault offenses." Mo.Rev.Stat. § 589.040 (Supp. 1984). The statute, which became effective in 1980, required that all prisoners serving sentences for sexual assault offenses participate in MOSOP. According to the testimony of Marie Clark, the director of the program at MECC, Phase I of MOSOP is an orientation phase designed to acquaint the participants with the applicable law and the program, and generally requires thirty hours for completion. Phase II of MOSOP is the therapeutic component which focuses on problem solving and social skills. Phase II lasts from nine to twelve months, during which time the offenders meet in group counseling sessions for four hours per week. All sex offenders are required to complete Phase I and Phase II of MOSOP prior to being released on parole.

Parton testified that he first learned of MOSOP while he was still at the Missouri State Penitentiary, but that he was never told that completion of the program was a condition of his release on parole. Marie Clark, however, testified that the program is explained to the affected inmates and they are told of the requirement that they participate before they begin Phase I and again before beginning Phase II. She further testified that the inmates are asked to sign a form acknowledging their understanding of the program and their understanding of the participation requirement. (*See,* Exhibit 6, pp. 8-20, to brief in Support of Petitioner's Petition for Habeas Corpus filed on December 3, 1986).[1] Parton testified that he had refused to sign the MOSOP "contract."

Parton completed Phase I of MOSOP in December 1983 and he enrolled in Phase II in January 1984. However, he testified

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[1] All exhibits attached to the petitioner's brief will hereinafter be referred to as "Pet. Br. Exh. ____".

that he was assaulted by several other inmates later that month and had to be hospitalized. As a result of the continuous medical treatment he had to undergo and his temporary placement in detention, Parton missed a number of the group counseling sessions and was unable to continue his participation in Phase II.

In March 1984, Parton filed a civil rights action in this Court under 42 U.S.C. § 1983 against the Superintendent of MECC and several security officers at the institution, alleging *inter alia* that the defendants failed to protect him from attack by other inmates. *See, Edward Parton v. Gerard Frey, et al.*, No. 84-875-C (2). In the second amended complaint filed in that case on December 3, 1986, Parton also alleged that he was transferred in retaliation for filing suit against the defendants.

In April 1984, Parton was dismissed from Phase II of MOSOP because he had missed a number of sessions, but on April 23, 1984 he was placed in a new Phase II group. On May 7, 1984, Parton received a conduct violation for being one and one-half hours late in attending a "team" meeting. (Petitioner's Exh. 1). He testified that he had gone to the prison's mail room on that date and had sent a message to his MOSOP instructor that he would be late to class. However, before Parton got to this MOSOP class he was called to an interview concerning the conduct violation. As a result, Parton arrived sixteen minutes late to the MOSOP session and on May 9, he was dismissed from Phase II because his tardiness was deemed unexcusable.

On June 1, 1984, Parton was transferred from MECC to the Missouri State Penitentiary (MSP). He testified that he was told that this transfer was for security reasons related to the assault which had occurred in January, but the inmates who assaulted him at MECC have also been transferred to MSP. Parton further testified that prior to being transferred from MECC, the MOSOP instructor stated that he would not be able to re-enroll in the program for one year and that she believed that he con-

sidered his lawsuit to be more important than the program. He also testified that several other MECC officials had commented about his lawsuit just prior to the transfer. Before the hearing in this case, Parton had applied for writs of habeas corpus *ad testificandum* to secure the attendance and testimony of four other inmates. His applications were denied by the Court. (*See*, Memorandum and Order filed on May 21, 1987). At the hearing, Parton made an offer of proof that his proposed witnesses would have testified that they had been transferred from one institution to another in retaliation for filing lawsuits against prison officials.

There is no MOSOP program available to Parton at MSP and, therefore, he cannot complete Phase II at that facility. However, Marie Clark testified that she has the authority to have Parton transferred to a facility that offers the program. She further testified that she would be willing to arrange such a transfer to enable Parton to complete Phase II. Notwithstanding this offer, Parton testified that he would not re-enroll in MOSOP under any circumstances because he considers the program to be demeaning and racially biased.

By notice dated May 1, 1984, the Parole Board advised Parton that his presumptive release date had been extended to January 11, 1985 due to his inability to complete MOSOP Phase II by August 23, 1984, the previously-established release date. (Pet. Br. Exh. 1). In November 1984, Parton was notified that the January 11, 1985 release date had been cancelled because he had not completed Phase II. (Pet. Br. Exh. 2 and 3).

Marie Clark testified that the presumptive release date is the date on which an inmate is scheduled to be released on parole. The Parole Board establishes the presumptive release date on the assumption that the inmate will have fulfilled all conditions to being released by that date. Furthermore, the Parole Board establishes the presumptive release date without input from the MOSOP director. Consequently, an inmate who is required to

complete MOSOP may be given a presumptive release date which is earlier than the date on which he is scheduled to complete the program. If the inmate has not or cannot complete MOSOP by the presumptive release date, then the Parole Board determines whether the date should be extended.

According to Marie Clark's testimony, Parton is required by statute to serve nine/twelfths of his sentence prior to release. His incarceration would not be extended beyond the nine/twelfths release date by reason of his failure to complete MOSOP. However, if he completes MOSOP, then Parton could be eligible for release before reaching the nine/twelfths date.

Parton testified that he had not been given a parole interview since 1983. Parton's counsel has recently advised the Court that a parole hearing was held on August 11, 1987, following which the Parole Board decided to schedule a reconsideration hearing in August 1989 due to Parton's refusal to participate in MOSOP.

DISCUSSION

Due Process Claims (Grounds 1-3)

Parton asserts that he was denied due process by the Parole Board's extension and cancellation of his presumptive release date due to his failure to complete MOSOP, and by reason of the imposition of the requirement that he complete MOSOP as a condition of release. In this regard, Parton argues that he was never given notice of the MOSOP requirement and that he was not afforded a hearing before the Parole Board decided first to extend and later to cancel his presumptive release date.

A liberty interest protectible [sic] under the Fourteenth Amendment may arise from the Due Process Clause itself and from the laws of the state. *Hewitt v. Helms*, 459 U.S. 460 (1983). A state may create a liberty interest in parole by enac-

ting a statute which instills in a prisoner an "expectancy of release." *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex,* 442 U.S. 1 (1979); *Parker v. Corrothers,* 750 F.2d 653 (8th Cir. 1984). Furthermore, when a liberty interest in parole is created by state laws, "minimal due process considerations require that when parole is denied the board must inform the inmate of the reasons he falls short of qualifying for parole." *Dace v. Mickelson,* 816 F.2d 1277, 1279 (8th Cir. 1987).

In *Williams v. Missouri Bd. of Probation & Parole,* 661 F.2d 697 (8th Cir. 1981), the Court held that Mo.Rev.Stat. § 549.261, the parole statute in effect at the time Parton committed his offense, created in Missouri prisoners a liberty interest in parole release that is protected by the Due Process Clause. In 1982, however, the parole statute was amended so as to make parole release purely discretionary with the Board. *See,* Mo.Rev.Stat. § 217.690(1); *Maggard v. Wyrick,* 800 F.2d 195 (8th Cir. 1986). The current parole statute applies retrospectively. *See, Burnside v. White,* 760 F.2d 217, 220 (8th Cir. 1985). Parton concedes in his brief that under the current statute, "the decision to grant or not grant parole is discretionary . . ." (Pet. Br. p. 4). However, he argues that the two presumptive release dates given to him evinced the Board's decision to grant parole and thereby created a protected liberty interest. This argument is untenable.

Section 217.690(1) provides:

> When in its opinion there is reasonable probability that an inmate of a state correctional institution can be released without detriment to the community or to himself, the board *may in its discretion* release or parole such person. All paroles shall issue upon order of the board, duly adopted. [Emphasis added].

It has been held that the statute does not create a protected liberty interest in parole. *See, Gale v. Moore,* 763 F.2d 341, 343 (8th Cir. 1985) (*per curiam*); *Green v. Black,* 755 F.2d 687, 688

(8th Cir. 1985). Of course, a protected liberty interest may arise from "particularized standards or criteria" established to guide the state decisionmakers. *Olim v. Wakinekona,* 461 U.S. 238, 249 (1983). Such standards and criteria may be found in the state's regulations, practices or customs "which have been formally utilized through such devices as handbooks or inter-office memoranda or other standardized customs which limit the Board's discretion." *Gale v. Moore,* 763 F.2d at 343; *Green v. Black,* 755 F.2d at 688.

Here, Parton has pointed to no particularized standards or criteria from which his claimed liberty interest arises. Nevertheless, the Court has reviewed the state regulations promulgated under § 217.690 and finds that they, too, do not support Parton's argument. In particular, 14 CSR 80-2.010(4)(D) expressly provides that "[a]ll inmates imprisoned for sexual assault offenses shall participate in the prescribed treatment program developed by the Division of Adult Institutions prior to being eligible for release. (Section 589.040, R.S. Mo. (Supp. 1980))." The regulations further provide that the board must give written notice of its decision to an inmate, and that all adverse decisions of the board may be appealed by the inmate. 14 CSR 80-1.010(7) and (8). Of particular significance is that under the regulations, the board is required to conduct a pre-release review to determine whether the conditions of an inmate's presumptive release date have been met. After such review, the board must either approve, advance or delay the presumptive release date, or deny parole. 14 CSR 2.010(11). The regulations, however, do not require that the board conduct a hearing prior to delaying or approving the release date. In fact, the regulations mandate a hearing only in the following circumstances: an eligibility hearing, following which a presumptive release date is established, and a reconsideration hearing in cases where the presumptive release date is more than five years from the date of eligibility hearing or where no presumptive release date is set. 14 CSR 1.010(5)(B), (C) and (12).

Parton's contention that he was never told of the MOSOP prerequisite to release is belied by the testimony at the hearing. Marie Clark testified that all sexual offender inmates are advised of the requirement before they begin the initial phase of the program and a form is presented for them to sign acknowledging that they understand the requirement. Additionally, Parton testified that he knew about MOSOP before he transferred to MECC in December 1983 and that even though he enrolled in both phases of the program, he refused to sign the form. Thus, the undersigned finds that Parton was advised of the requirement that he complete MOSOP prior to being released.

The undersigned further finds that Parton was also given notice of the reasons for extending and cancelling his presumptive release date, consistent with the requirements of due process. As discussed above. Mo.Rev.Stat. § 589.040 (Supp. 1984) provides that all inmates serving sentences for sexual assault offenses must participate in MOSOP, and the parole regulations clearly provide that MOSOP participation is a condition of parole release. Thus, Parton's failure to complete MOSOP was a permissible reason for the board's action.

In connection with his due process claim, Parton asserts that the action taken by the parole board was done in retaliation for a civil rights lawsuit he filed against employees of the Missouri Department of Corrections. In support of his assertion, Parton testified that his MOSOP instructor and other prison employees had commented about his lawsuit. Additionally, he points to a parole report (Pet. Br. Exh. 2) which sets forth a comment (allegedly made by Marie Clark) that Parton "was more interested in filing lawsuits" than in participating in MOSOP. Initially, the undersigned notes that there is no evidence that the comments purportedly made by the MOSOP instructor or the other prison employees were communicated to the parole board. Furthermore, the isolated reference in the parole report constitutes insufficient evidence that Parton's presumptive release date was cancelled because he filed a lawsuit. When the

report is read in full, it is apparent that the board's decision was premised on Parton's failure to complete MOSOP "due to disruptive behavior and poor performance." While the board may have considered that Parton's poor performance in MOSOP may have been occasioned by his involvement in litigation activities, there is no evidence that the board did so and no evidence that such a consideration was a factor in the board's decision.

Finally, Parton's contention that he has been denied the opportunity to participate in MOSOP is without merit. Although there is no MOSOP program available to Parton at the Missouri State Penitentiary where he is presently confined, the respondent states that a transfer to another facility would be arranged so that Parton could complete Phase II of the program. Parton, however, testified that he would not complete the program under any circumstances. Therefore, he should not be heard to complain on this point.

Ex Post Facto and Retaliatory Transfer Claims (Gounds 4 and 5).

The three grounds discussed above were raised by Parton in his habeas petition. Although the respondent initially argued that Parton had not exhausted state remedies, this Court concluded that the exhaustion requirement had been met with respect to those three grounds. (*See,* Memorandum and Order filed on August 13, 1986). However, in the briefs filed in support of his habeas petition, Parton articulates two additional grounds for relief — that he was transferred from MECC to the Missouri State Penitentiary in retaliation for filing a lawsuit against certain prison employees (ground 4), and that the Missouri parole and MOSOP statutes now in effect constitute *ex post facto* legislation. Upon review of the record, the undersigned finds that neither claim was presented to any Missouri court for consideration.

Exhaustion of available state remedies is a prerequisite to seeking habeas relief under 28 U.S.C. § 2254. Thus, a petitioner

must present the substance of his federal constitutional claims to the state courts and afford those courts full and fair opportunity to apply controlling legal principles to the facts bearing on his constitutional claims. *Anderson v. Harless,* 459 U.S. 4 (1982). It is not necessary that the state courts rule on the merits of petitioner's claims, as the exhaustion requirement is satisfied if the state courts have been fairly presented with the opportunity to do so.

It is evident that Parton has not exhausted state remedies with respect to grounds 4 and 5. Even though the respondent has not challenged Parton's failure to exhaust, the Court may raise the issue *sua sponte. See, Davis v. Campbell,* 608 F.2d 317 (8th Cir. 1979). The undersigned notes that the respondent does not state or otherwise concede that Parton has satisfied the exhaustion prerequisite under § 2254(b). Therefore, there has been no express waiver of this statutory requirement. *See, Purnell v. Missouri Dept. of Corrections,* 753 F.2d 703, 708 (8th Cir. 1985); *Davis v. Campbell, supra.* Given the petitioner's non-exhaustion and the absence of express waiver by the respondent, this Court is barred from considering the unexhausted grounds.

Implicit in the exhaustion requirement is that there must be a state remedy available to the petitioner. Under Missouri Supreme Court Rule 91, an individual held in custody on a criminal charge may challenge such restraint by petitioning the state court for a writ of habeas corpus. Thus, Missouri law affords Parton a means by which to obtain relief.

As a final point, the undersigned notes that the petitioner's remaining claims involve a determination of the constitutionality of two Missouri statutes. In the interest of comity, the state should be given the first opportunity to resolve this issue. *See, Fay v. Noia,* 372 U.S. 391 (1963).

Accordingly,

IT IS HEREBY RECOMMENDED that the petition of Edward Parton for a writ of habeas corpus under 28 U.S.C. § 2254 be denied as to grounds 1, 2 and 3 asserted therein.

IT IS FURTHER RECOMMENDED that the claims asserted by the petitioner in grounds 4 and 5 be dismissed without prejudice. The parties are advised that they have ten (10) days to file written objections to this report and recommendation.

/s/ CAROL E. JACKSON
UNITED STATES MAGISTRATE

Dated this 14th day of October, 1987.

APPENDIX J

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 85-2111 C (5)

Edward Parton,
Plaintiff,

v.

William M. Armontrout,
Respondent.

MEMORANDUM AND ORDER

This matter is before the Court upon the petition of Edward Parton for a writ of habeas corpus pursuant to 28 U.S.C. §2254. This cause was referred to the undersigned United States Magistrate pursuant to 28 U.S.C. §636(b).

In 1971, a jury in the Circuit Court of the City of St. Louis Missouri, convicted the petitioner of statutory rape for which he was sentenced to fifty years imprisonment. The conviction and sentence were affirmed on direct appeal. *State of Missouri v. Parton,* 487 S.W. 2d 523 (Mo. 1972). Petitioner subsequently filed a motion to vacate the judgment and sentence under Missouri Supreme Court Rule 27.26. This motion was overruled. The petitioner then filed two applications for writs of *error coram nobis*, both of which were dismissed. In the subsequent appeal of the denial of his Rule 27.26 motion and the petitions for writs of *error coram nobis*, all three judgments were affirmed. *Parton v. State of Missouri,* 545 S.W. 2d 338 (Mo. App. at 1976). The petitioner then filed a petition for a writ of habeas corpus in this Court. The Court dismissed that petition and the dismissal was affirmed on appeal. *Parton v. Wyrick,* 614 F.2d 154 (8th Cir. 1980).

The petitioner filed the instant habeas corpus petition on September 23, 1985. He asserts as grounds for relief: (1) that he was given and subsequently denied parole release dates of August 1984 and January 1985 by the Missouri Board of Probation and Parole without notice, hearing or valid reason in retaliation for a lawsuit he instituted pursuant to 42 U.S.C. §1983 against prison officials; and (2) the Parole Board denied his parole release because he failed to complete the Missouri Sexual Offenders Program, even though completion of the program was not a condition imposed at the time the release dates were granted and the institution where the petitioner is confined does not have a sex offenders program.[1]

The respondent argues that the petitioner has failed to exhaust his available state remedies with respect to these claims and that he is required to seek relief in the Missouri courts by filing a declaratory judgment action pursuant to Missouri Supreme Court Rule 82.02(c). The petitioner asserts in response that he has exhausted his federal habeas grounds by presenting his constitutional claims to the Cole County Circuit Court (*Parton v. Armontrout,* No. CV 185-30 CC) and to the Missouri Court of Appeals (*Parton v. Armontrout,* No. WD 37,289). In the alternative, the petitioner argues that any further attempts to exhaust would be futile since his claims were summarily rejected by the state courts.

Exhaustion of available state remedies is a prerequisite to seeking habeas relief under 28 U.S.C. §2254. Thus, a petitioner must present the substance of his claim to the state courts and the state courts must be given a fair opportunity to apply the controlling legal principles to the facts bearing on the petitioner's constitutional claim. *Anderson v. Harless,* 459 U.S.

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[1] The petitioner states he was initially confined at the Missouri Eastern Correctional Center which has a sex offenders program. However, he was later transferred for safety reasons to the Missouri State Penitentiary which has no sex offenders program.

4 (1982). It is not necessary that the state courts rule on the merits of the petitioner's claim, as the exhaustion requirement is satisfied if state courts have been fairly presented with the opportunity to do so.

To determine whether the petitioner has complied with the exhaustion requirement, it is necessary to examine the pleadings before the Cole County Circuit Court and the Missouri Court of Appeals. *See Graham v. Solem,* 723 F.2d 1533 (8th Cir. 1984). These materials have not been furnished to the Court, and on the basis of the current record, it cannot be determined whether the petitioner has in fact given the Missouri courts a full and fair opportunity to apply the law to the claims he now raises. Accordingly,

IT IS HEREBY ORDERED that the petitioner shall within twenty (20) days of this order submit to the court the record of proceedings before the Cole County Circuit Court in *Parton v. Armontrout,* No. CV 185-30 CC and before the Missouri Court of Appeals in *Parton v. Armontrout,* No. WD 37,289. The record submitted shall include all pleadings, briefs, opinions and other pertinent papers.

/s/ Carol E. Jackson
United States Magistrate

Dated this 26th day of June, 1986.

APPENDIX K

STATE OF MISSOURI
DEPARTMENT OF CORRECTIONS
AND HUMAN RESOURCES

BOARD OF PROBATION AND PAROLE

Date May 1, 1984

PARTON, Edward
#20807
Pacific

I. RELATING TO RELEASE CONSIDERATION

☐ 1. You have been scheduled for a parole hearing _____.

☐ 2. You have been given parole consideration in a parole hearing/review on _____: You will be scheduled for a reconsideration hearing _____: You will be scheduled for a review _____.

☐ 3. You have been scheduled for release from confinement _____.
Actual release depends upon continued record of good conduct and an acceptable release plan. The release decision is: ☐ Guideline ☐ Below Guideline ☐ Above Guideline.

☒ 4. Your previously set release date has been extended to 1-11-85.

☐ 5. Your conditional release date has been extended to _____.

☐ 6. The Board has reviewed your appeal. It is the decision of the Board to sustain/deny your appeal.

☐ 7. _____

II. RELATING TO PAROLE/CONDITIONAL RELEASE VIOLATION

Following your violation hearing on _____; or your waiver of violation hearing, signed by you on _____.

☐ 1. You have been revoked. Your copy of the Order of Revocation is attached.

☐ 2. A total of ____ years ____ months ____ days ____ will not be counted as time served on your sentence, in accordance with Board decision pursuant to Section 217.720 RSMo. Your new maximum date will be _____.

The reasons for the action taken are:

On 4-18-84 we were advised by the institutional parole staff that you will not be able to participate in Phase II of MOSOP by your presumptive release date of 8-23-84. Therefore, the Board is cancelling this release date and is scheduling you for release on 1-11-85 after you have successfully completed the program.

WAC:kp

If you have any questions regarding this decision please contact your Institutional Parole Officer.

APPENDIX L

STATE OF MISSOURI
DEPARTMENT OF CORRECTIONS
AND HUMAN RESOURCES

BOARD OF PROBATION AND PAROLE

Date November 7, 1984

PARTON, Edward
#20807
MSP

I. RELATING TO RELEASE CONSIDERATION

☐ 1. You have been scheduled for a parole hearing _____.

☐ 2. You have been given parole consideration in a parole hearing/review on _____: You will be scheduled for a reconsideration hearing _____: You will be scheduled for a review _____.

☐ 3. You have been scheduled for release from confinement _____.
Actual release depends upon continued record of good conduct and an acceptable release plan. The release decision is: ☐ Guideline ☐ Below Guideline ☐ Above Guideline.

☒ 4. Your previously set release date has been cancelled. Your case will be reviewed in 8-85.

☐ 5. Your conditional release date has been extended to _____.

☐ 6. The Board has reviewed your appeal. It is the decision of the Board to sustain/deny your appeal.

☐ 7. _____

II. RELATING TO PAROLE/CONDITIONAL RELEASE VIOLATION

Following your violation hearing on _____; or your waiver of violation hearing, signed by you on _____.

☐ 1. You have been revoked. Your copy of the Order of Revocation is attached.

☐ 2. A total of ____ years ____ months ____ days ____ will not be counted as time served on your sentence, in accordance with Board decision pursuant to Section 217.720 RSMo. Your new maximum date will be _____.

The reasons for the action taken are:

On 9-26-84, we were advised by Institutional Parole Staff that you have failed to complete MOSOP program.

Due to your inability to satisfactorily complete Phase II of MOSOP, the Board is cancelling your release of 1-11-85 and scheduling you for a review in 8-85.

WAC:ls

If you have any questions regarding this decision please contact your Institutional Parole Officer.

APPENDIX M

STATE OF MISSOURI
DEPARTMENT OF CORRECTIONS
AND HUMAN RESOURCES

BOARD OF PROBATION AND PAROLE

Date 12-5-84

PARTON, Edward
#20807
MSP

I. RELATING TO RELEASE CONSIDERATION

☐ 1. You have been scheduled for a parole hearing _____.

☐ 2. You have been given parole consideration in a parole hearing/review on _____: You will be scheduled for a reconsideration hearing _____: You will be scheduled for a review _____.

☐ 3. You have been scheduled for release from confinement _____.
Actual release depends upon continued record of good conduct and an acceptable release plan. The release decision is: ☐ Guideline ☐ Below Guideline ☐ Above Guideline.

☐ 4. Your previously set release date has been advanced/extended to _____

☐ 5. Your conditional release date has been extended to _____.

☒ 6. The Board has reviewed your appeal. It is the decision of the Board to deny your appeal.

☐ 7. _____

II. RELATING TO PAROLE/CONDITIONAL RELEASE VIOLATION

Following your violation hearing on _____; or your waiver of violation hearing, signed by you on _____.

☐ 1. You have been revoked. Your copy of the Order of Revocation is attached.

☐ 2. A total of ____ years ____ months ____ days ____ will not be counted as time served on your sentence, in accordance with Board decision pursuant to Section 217.720 RSMo. Your new maximum date will be _____.

The reasons for the action taken are:

If you have any questions regarding this decision please contact your Institutional Parole Officer.